

#### IV. The Ex Parte Issue

183. The prohibition against ex parte communications in agency adjudications is a constitutionally-based component of due process which is essential to the integrity of the administrative process. E.g., PATCO v. Federal Labor Relations Authority, ("PATCO II"), 685 F.2d 547 (D.C. Cir. 1982); Home Box Office, Inc. v. FCC ("HBO"), 567 F.2d 9, 54-55 (D.C. Cir. 1977); WKAT, Inc. v. FCC, 296 F.2d 375, 383 (D.C. Cir. 1961), cert. denied, 368 U.S. 841; House Report on Government in the Sunshine Act, P.L. 94-409, No. 94-880 (March 8, 1976) at 19 (limitations on ex parte contacts in agency proceedings are governed by, inter alia, constitutional standards); Ex Parte Presentations, 1 FCC 2d 49, 50 (1965); Ex Parte Rules, 2 FCC Rcd 3011 (1987). Ex parte misconduct is so fundamentally contrary to basic notions of due process that "[n]o law or regulation is required to establish the principle or to impose sanctions on those who disregard it." Ex Parte Communications, 1 FCC 2d 49, 50 (1965).

184. Violations of ex parte rules are misconduct of the worst sort, going to the "vital heart of administrative law." Stearns County Broadcasting Co., 104 FCC 2d 688, 696 (Rev. Bd. 1986). Condonation of such violations would threaten "the sanctity of the adjudicatory processes" and "make a mockery of justice", PATCO II, supra. As the Court of Appeals has observed, surreptitious ex parte attempts to influence agency proceedings run so counter to basic principles of government that

[h]e who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than

the matter involved in that proceeding.

WKAT, supra.

185. For its part, the Commission has made clear that ex parte violations can and should warrant disqualification or other serious penalty. See, e.g., Ex Parte Presentations, 1 FCC 2d 49 (1965) (citing, inter alia, the Court's opinion in WKAT); Voice of Reason, Inc., 37 FCC 2d 686 (Rev. Bd. 1972); Stearns County Broadcasting Co., supra.

186. The record evidence establishes beyond question that RBC, through its counsel, Ms. Polivy, and its dominant principal, Mr. Rey, knowingly violated the Commission's ex parte rules in an effort to influence the disposition of the RBC applications and to gain a result favorable to RBC. See supra at e.g., Paragraphs 114-148. The ex parte violations included not only direct communications between RBC and the Commission's staff, but also the enlistment of Ms. Bush, an influential Senate staffperson, to bring pressure on the staff on RBC's behalf. Such insidious, inimical sub rosa interference is precisely the type of noxious misconduct which is prohibited by the ex parte rules.

187. Previously, RBC has asserted that any ex parte violation which occurred was merely the result of some "sincere belief" on RBC's part that it was not subject to any ex parte restrictions. See, e.g., Press Broadcasting Company, Inc. v. FCC, 59 F.3d at 1370-71. But the notion of any such "sincere belief" must be flatly rejected in the face of the unequivocal

notice of the applicability of ex parte restrictions to RBC, notice which was provided directly to RBC and its counsel both in writing (in the Sandifer Letter) and, on at least three or four separate occasions, orally (by Mr. Gordon). Moreover, the fanciful notion of some "sincere belief" on RBC's part is founded only on the completely non-credible testimony of Ms. Polivy (see supra at, e.g., Paragraphs 156-157). RBC cannot legitimately assert that its ex parte misconduct was borne of innocent misunderstanding of the rules. <sup>54/</sup>

188. And even if RBC really had been somehow confused about the applicability of the rules -- and such a claim of confusion is not supported by the record here -- that would be unavailing. The Commission has explicitly stated that, where a private party disagrees with a staff determination concerning the applicability of the ex parte rules to a particular situation, it is the private party's duty to resolve any such disagreement by inquiry to the General Counsel's office. Ex Parte Rules, 2 FCC Rcd at 3023, ¶91. The record evidence indicates that Ms. Polivy made no effort at all to determine, from anyone at the Commission, whether her interpretation of the ex parte rules was correct. Tr. 411; Press Exhs. 19, 20 and 21. Accordingly, she failed to resolve the matter as required by the Commission's policies.

189. While it may be argued that RBC should not be

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<sup>54/</sup> See also Press Broadcasting Company, Inc. v. FCC, 59 F.3d at 1370 (RBC "could not reasonably have believed the proceeding to be unrestricted because the FCC had repeatedly informed [RBC]'s counsel that it considered the adjudication to be restricted within the meaning of the ex parte rules.").

penalized for the misconduct of its counsel, the Commission has a longstanding policy that holds applicants responsible for the conduct, and misconduct, of their counsel except in certain extraordinary circumstances not present here. E.g., Pontchartrain Broadcasting Co., Inc., 7 FCC Rcd 1898, 1903, ¶18 (Rev. Bd. 1992), rev. denied, 8 FCC Rcd 2256 (1993), aff'd, 15 F.3d 183 (D.C. Cir. 1994); James C. Sliger, 70 FCC 2d 1565, 1572 (Rev. Bd. 1979). Moreover, it cannot be said that the ex parte violations occurred without RBC's knowledge or consent, since Mr. Rey himself personally participated in the July 1, 1993 meeting in Mr. Stewart's office. As a result, RBC itself must be held directly accountable for the ex parte violations.

190. With respect to the penalty which should be assessed for the ex parte violation, the Commission has apparently not, at least in the recent past, disqualified any applicant for such violations. See, e.g., Centel Corp., 8 FCC Rcd 6162 (1993); Pepper Schultz, 4 FCC Rcd 6393 (Rev. Bd. 1989). However, no other case in the recent past has featured such direct and flagrant violations of the rules, violations undertaken by, inter alia, expert and experienced counsel in a manner designed to assure the maximum efficacy of the ex parte contacts. <sup>55/</sup>

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<sup>55/</sup> In Centel, the ex parte violation involved an inadvertent failure to serve on an adverse party some relatively inconsequential papers. Here, by contrast, Press was excluded from a number of substantive discussions of the merits of the case. In Schultz, a pro se applicant, claiming ignorance of the ex parte rules, solicited a completely ineffectual letter from a Senator to an agency official. Here, by contrast, RBC and its counsel secured the very effective assistance of an influential  
(continued...)

191. The ex parte misconduct in which RBC has engaged runs so contrary to basic notions of due process that disqualification is warranted. The Commission must be resolute in its determination not to permit its processes to be corrupted by ex parte communications. Despite repeated, express notices that its applications were restricted within the meaning of the ex parte rules, RBC chose to violate those rules. Such misconduct unquestionably demonstrates that RBC cannot be deemed to be qualified to be a Commission licensee.

192. But even if disqualification were deemed, arguendo, to be too harsh a sanction, the appropriate alternative sanction would be the denial of RBC's applications without a determination of disqualification because of the ex parte violations. See, e.g., WKAT, supra ("[h]e who engages in [ex parte misconduct] in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding").

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<sup>55</sup>/ (...continued)

Senate staffmember, and they themselves similarly engaged in direct, substantive communications with the MMB staff. Moreover, unlike earlier cases in which the ex parte violations were uncovered before they could bear fruit for the violators, here RBC's violations were completely successful -- almost immediately following the improper ex parte contacts, RBC's wish was granted: its applications were reinstated and granted, and it was authorized to construct and operate its station, albeit at RBC's own risk. In other words, thanks to RBC's ex parte violations, RBC was able to secure opportunities which had been foreclosed by Ms. Kreisman's June 18, 1993 letter. RBC has been operating its station pursuant to the ex parte-influenced reinstatement and grant of its applications for more than two years already.

V. Ultimate Conclusion

193. RBC has engaged in repeated, serious misconduct of the worst sort. It has made repeated misrepresentations to the Commission, and it has flagrantly violated the Commission's ex parte rules. Each of these separate violations, independently of the others, warrants the disqualification of RBC. And, as noted, even if the ex parte violation were deemed, arguendo, not to be absolutely disqualifying in and of itself, the misconduct at issue there is sufficiently serious to warrant, at a minimum, denial of RBC's applications even if RBC were not to be found disqualified under the ex parte issue. <sup>56/</sup>

194. Moreover, even if RBC were somehow deemed to be qualified, the fact is that RBC has failed to satisfy the prerequisites for grant of its applications. In particular, RBC has failed to establish that an extension of its permit pursuant to Section 73.3534 is justified. To the contrary, the evidence establishes conclusively that no such extension is warranted at all under clear Commission precedent.

195. As a result, it is concluded that RBC is not qualified to remain a permittee, and that even if it were, its extension applications could not be granted. Accordingly, those applications must be denied. Because of that denial, RBC's assignment application must be dismissed as moot (as RBC no

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<sup>56/</sup> Of course, even if RBC were not disqualified under the ex parte issue, that would not alter the conclusions under the two separate misrepresentation issues, each of which, independently of the other, supports disqualification.

longer has anything to assign), RBC's permit must be cancelled, RBC's call signs must be deleted, and operation of Station WRBW(TV) must be terminated immediately. <sup>57/</sup>

WHEREFORE, for the reasons stated, it is concluded that RBC has repeatedly committed misrepresentation and lack of candor. As a result of which it is concluded that RBC is not qualified to remain a Commission permittee. It is further concluded that RBC has intentionally violated the Commission's ex parte rules in a manner which disqualifies RBC from remaining a Commission permittee. It is further concluded that RBC has failed to demonstrate that any extension of its construction permit is warranted. Accordingly, RBC's applications for extension of its construction permit are hereby denied, its application for consent to the assignment of that permit is dismissed, the permit

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<sup>57/</sup> While, as a technical matter, Station WRBW(TV) is apparently being operated by RBL, rather than RBC, that makes no difference in the ultimate disposition of this case. RBC and RBL are essentially the same entity, both controlled by Mr. Rey. E.g., Tr. 8. Further, when Press raised questions at the first prehearing conference herein about the absence of RBC from this hearing, it was clearly and unequivocally conceded by counsel for RBL that, if the issues were to be resolved adversely to RBC, then RBL would be bound by the decision and would relinquish the authorization. Tr. 8-9, 13. Thus, the adverse conclusions reached herein will not be affected by any questions concerning RBL's position vis-à-vis RBC or the station. Moreover, as noted above, in Footnote 55, any actions taken by RBC or RBL in reliance on Mr. Stewart's July 30, 1993 action were taken at the risk of RBC/RBL. Mr. Stewart's action was appealed in a timely manner and it has never become "final". RBC and RBL were well aware of the filing of Press' appeal. If they chose nonetheless to go forward (particularly knowing the underlying facts as disclosed in this record), they did so at their own risk. In any event, RBC/RBL should not be permitted to take any further undue advantage of the authorization which they obtained through their own misconduct.

is deleted, the call sign WRBW(TV) is deleted, and the operation of Station WRBW(TV) is ordered to be terminated immediately.

Respectfully submitted,

  
/s/ ~~Harry F. Cole~~  
Harry F. Cole

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Counsel for Press Broadcasting  
Company, Inc.

September 26, 1996



ATTACHMENT A



# PUBLIC NOTICE

Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

October 5, 1990

Report No. 14838

10078

## BROADCAST APPLICATION

Commercial TV Broadcast station application accepted for filing on April 13, 1990.

<u>STATE</u>	<u>FILE NUMBER</u>	<u>CALL LETTER</u>	<u>APPLICANT + LOCATION</u>	<u>NATURE OF APPLICATION</u>
FL	BMPCT-900413KI	WKCF(TV) chan-68	PRESS TELEVISION CORPORATION Clermont, FL	MP(BPCT-850214KQ) to change from channel 68 to channel 18; ERP(Vis): 5,000 kW; HAAT: 457.6 meters; TL: 20,000 Fort Christmas Road, Christmas, Florida (Orange County); ANT: Dielectric/TFU-38J(DA)(BT) 28-34-51/81-04-32 per MM Docket #89-68 Harry F. Cole-Attorney

-FCC-

ATTACHMENT B



# PUBLIC NOTICE

Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

10731

REPORT NO. 20996

BROADCAST ACTIONS

Nov. 27, 1990

STATE	FILE-NUMBER	CALL-LETTERS	APPLICANT + LOCATION	NATURE OF APPLICATION
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THE COMMISSION, BY ITS MASS MEDIA BUREAU, ON NOVEMBER 14, 1990, GRANTED THE FOLLOWING APPLICATIONS FOR RENEWAL OF LICENSE INCLUDING SUBSIDIARY COMMUNICATIONS AUTHORITY (BACKGROUND MUSIC, ETC.), WHERE APPLICABLE:

IA BR	-891002WZ	KDTH	WOODWARD COMMUNICATIONS, INC.	DUBUQUE , IA	AM STATION RENEWAL OF LICENSE
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THE COMMISSION, BY ITS MASS MEDIA BUREAU, ON NOVEMBER 19, 1990, GRANTED THE FOLLOWING APPLICATIONS FOR RENEWAL OF LICENSE INCLUDING SUBSIDIARY COMMUNICATIONS AUTHORITY (BACKGROUND MUSIC, ETC.), WHERE APPLICABLE:

FL BRH	-880727YR	WTBB	MARY LAKE COMMUNICATIONS, INC.	BONIFAY , FL	FM STATION RENEWAL OF LICENSE. INFORMAL OBJECTION FILED ON 3-6-89. INFORMAL OBJECTION DENIED 4/3/90.
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OK BR	-900131UZ	KADS	INVESTAR, INCORPORATED	ELK CITY , OK	AM STATION RENEWAL OF LICENSE
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THE COMMISSION, BY ITS MASS MEDIA BUREAU, ON NOVEMBER 20, 1990, GRANTED THE FOLLOWING APPLICATIONS FOR RENEWAL OF LICENSE INCLUDING SUBSIDIARY COMMUNICATIONS AUTHORITY (BACKGROUND MUSIC, ETC.), WHERE APPLICABLE:

KS BRFT	-900514TV	K252AW	KANZA SOCIETY, INC.	TRIBUNE , KS	FM TRANSLATOR RENEWAL OF LICENSE
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KS BRFT	-900517TC	K249CU	CONCORDIA CHRISTIAN RADIO ASSOC.	CONCORDIA , KS	FM TRANSLATOR RENEWAL OF LICENSE
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- O V E R -

## ACTION OF: OCTOBER 31, 1990

FL BMPCT -900413KI WKCF  
CHAN-68PRESS TELEVISION CORPORATION  
CLERMONT, FL

APPLICATION GRANTED TO COMMERCIAL TV BROADCAST STATION  
MP(BPCT-850214KQ) TO CHANGE FROM CHANNEL 68 TO CHANNEL 18;  
ERP(VIS): 5,000 KW; HAAT: 457.6 METERS; TL: 20,000 FORT  
CHRISTMAS ROAD, CHRISTMAS, FLORIDA (ORANGE COUNTY); ANT:  
DIELECTRIC/TFU-38J(DA)(BT) 28-34-51/81-04-32 PER MM  
DOCKET #89-68  
HARRY F. COLE-ATTORNEY  
\*APPLICATION ACCEPTED BY MANUAL PUBLIC NOTICE. REPORT NO.  
14838; RELEASE DATE: OCTOBER 5, 1990

## ACTION OF: NOVEMBER 8, 1990

TN BALH -901031HW WRMX  
96.3MHZNASHVILLE PARTNERS, L.P.  
MURFREESBORO, TN

APPLICATION GRANTED TO FM BROADCAST STATION  
VOL AL FROM SIGNATURE BROADCASTING COMPANY TO SHORES  
BROADCASTING COMPANY FORM 316 AUX.  
ATTY: HEIDI P. SANCHEZ ASSIGNEE ADDRESS: 2407  
ENFIELD ROAD, AUSTIN, TX 78703

## ACTION OF: NOVEMBER 9, 1990

CO BPH -890123MP NEW  
106.3MHZDOUGLAS C. TURNBULL  
BRUSH, CO

APPLICATION GRANTED TO FM BROADCAST STATION  
CP FOR NEW FM ON FREQUENCY: 106.3 MHZ, #292; ERP 3.0 KW H&V  
HAAT 23 METERS H&V 40 15 39 103 38 15

GA BTC -901017GY WLOP  
1370KHZJESUP BROADCASTING CORP.  
JESUP, GA

APPLICATION GRANTED TO AM BROADCAST STATION  
VOL TC OF JESUP BROADCASTING FROM DALE VAN CANTFORT TO  
DON LADUKE FORM 316  
ATTY: NONE SPECIFIED

GA BTCH -901017GZ WIFO-FM  
105.5MHZJESUP BROADCASTING CORP.  
JESUP, GA

APPLICATION GRANTED TO FM BROADCAST STATION  
VOL TC OF JESUP BROADCASTING FROM DALE VAN CANTFORT TO  
DON LADUKE FORM 316  
ATTY: NONE SPECIFIED

IA BALH -900830HP KPLW  
102.7MHZNORTHWOOD BROADCASTING CO., INC.  
NORTHWOOD, IA

APPLICATION GRANTED TO FM BROADCAST STATION  
VOL AL FROM NORTHWOOD BROADCASTING CO., INC., TO TRI-CITIES  
BROADCASTING, LIMITED ATTY: JOHN P. BANKSON, JR.  
(ASNE) ADDRESS: P.O. BOX 947, BRYN MAWR, PA 19010  
FORM 314

CERTIFICATE OF SERVICE

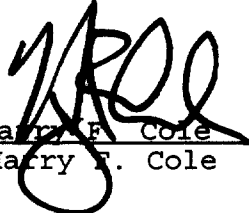
I, Harry F. Cole, hereby certify that on this 26th day of September, 1996, I have caused copies of the foregoing "Proposed Findings of Fact and Conclusions of Law of Press Broadcasting Company, Inc." to be hand delivered to the following individuals:

The Honorable Joseph Chachkin  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W. - Room 226  
Washington, D.C. 20554

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/s/ Harry F. Cole  
Harry F. Cole